



COMMONWEALTH of VIRGINIA

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January 30, 2015

Michael W. S. Lockaby, Esquire
County Attorney for Louisa County
One Woolfolk Avenue
Post Office Box 160
Louisa, Virginia 23093

Dear Mr. Lockaby:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

Your inquiry regards the scope of authority of the Louisa County Industrial Development Authority (the "IDA") to operate a general aviation airport located in Louisa County (the "Airport"). You ask the following questions:

- 1) Is the IDA authorized by Virginia law to operate the Airport?
- 2) Does the performance of certain airport functions by independent contractors mean that the IDA is not operating the Airport?
- 3) What is the legal effect of certification by the IDA's counsel that the IDA has the authority to perform certain airport tasks?
- 4) May the Louisa County Board of Supervisors (the "Board") limit the authority of the IDA to incur debt and ensure that the IDA's actions serve the County's economic development goals?

Background

In 1978, the Board created the IDA¹ pursuant to the Industrial Development and Revenue Bond Act (the "Act").² In the 1980s, the IDA developed the Airport, which is located in an industrial park on land owned by the IDA. The IDA obtained its first license to operate the Airport from the Virginia Department of Aviation (the "Department") in June 1986, and it is still the license holder. Pursuant to its license, the IDA is the legally responsible operator of the Airport.

¹ COUNTY OF LOUISA, VA., CODE §§ 2-70-71. Section 2-71 reads "The industrial development authority of the county shall have all powers and perform all duties prescribed for industrial development authorities as set forth in the Industrial Development and Revenue Bond Act, Code of Virginia, § 15.2-4900 et seq., and other state laws relating to industrial development authorities."

² VA. CODE ANN. §§ 15.2-4900 through 15.2-4920 (2012 & Supp. 2014).

Over time, the IDA has hired independent contractors, including a mechanic who rented garage space and Fixed-Base Operators who provided fuel services and other services. The IDA now employs a manager to oversee all Airport operations and to be in charge of all the Airport's real property, including hangars, terminal, and garages. The manager operates under general supervision of the IDA. Since 1986, the Airport manager, acting on behalf of the IDA, has sought and obtained grants from the Department and the Federal Aviation Administration. All such grants included a certification from the IDA's attorney that the IDA was authorized to receive the grants. You also state that to the best of your knowledge no other IDA in Virginia operates an airport, and all other local airports are operated either by localities or airport authorities pursuant to express grants of authority from the General Assembly.

The facts you present describe a well-run airport that has been recognized for its achievements and its contributions to Louisa County.

Applicable Law and Discussion

1. Is the IDA authorized by Virginia law to operate the airport?

You first ask whether the IDA is authorized by Virginia law to operate an airport. As political subdivisions of the Commonwealth,³ IDAs are subject to Dillon's Rule,⁴ which limits their powers to those expressly granted by the legislature, those that are fairly or necessarily implied from expressly granted powers, and those that are indispensable and essential.⁵

As articulated by the Act, the General Assembly authorized the creation of IDAs by localities "so that such authorities may acquire, own, lease, and dispose of properties and make loans to the end that such authorities may be able to promote industry and develop trade by inducing manufacturing, industrial, governmental, nonprofit and commercial enterprises and institutions of higher education to locate in or remain in the Commonwealth"⁶

The Act specifies numerous types of projects or activities (called "Authority facilities") that are authorized for IDAs.⁷ Airports are not included.

³ See § 15.2-4903.

⁴ *Marble Technologies, Inc. v. City of Hampton*, 279 Va. 409, 417 (2010).

⁵ *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 576 (2012).

⁶ Section 15.2-4901.

⁷ Section 15.2-4902 defines "Authority facilities" or "facilities" as

any or all (i) medical (including, but not limited to, office and treatment facilities), pollution control or industrial facilities; (ii) facilities for the residence or care of the aged; (iii) multi-state regional or national headquarters offices or operations centers; (iv) facilities for private, accredited and nonprofit institutions of collegiate, elementary, or secondary education in the Commonwealth whose primary purpose is to provide collegiate, elementary, secondary, or graduate education ... (v) parking facilities, including parking structures; (vi) facilities for use as office space by nonprofit, nonreligious organizations; (vii) facilities for museums and historical education, demonstration and interpretation, together with buildings, structures or other facilities necessary or desirable in connection with the foregoing, for use by nonprofit organizations; (viii) facilities for use by an organization ... which is described in § 501(c)(3) of the Internal Revenue Code of 1986, as amended ... (ix) facilities for use by a locality, the Commonwealth and its agencies, or other governmental organizations ...; (x) facilities devoted to the staging of equine events and activities (other than racing events) ... (xi) facilities for commercial enterprises that are not enterprise zone facilities ... and (xiii) facilities used primarily for single or multi-family residences

In contrast, the General Assembly has explicitly authorized other political subdivisions to operate airports. For example, all Virginia localities are authorized by statute to:

[A]cquire, by purchase, lease, gift, condemnation or otherwise, within or without the limits of any such city, town or county, whatever land may be reasonably necessary for the purpose of establishing, constructing, owning, controlling, leasing, equipping, improving, maintaining and operating airports for the use of airplanes; may acquire, establish, construct, enlarge, improve, maintain, equip, operate and regulate the use of such airports or landing fields, structures, air navigation facilities and other property incident thereto; may make, prior to such acquisition, investigation, surveys and plans and enter upon any lands or waters for such purposes; may construct, install, maintain and operate facilities for the servicing of aircraft, and for the accommodation and comfort of air travelers; may purchase and sell equipment and supplies as an incident to the operation of its airport properties. . . .^[8]

There is further statutory authorization for localities to continue operating airports or to delegate their operation to some other “suitable” officer, board, or body, provided approval is obtained from the Virginia Aviation Board:

The governing body, or other proper authority, of a county, city, or town which has established an airport or landing field and acquired, leased, or set apart property for such purpose, may construct, improve, equip, maintain and operate the same, or may vest jurisdiction for the construction, improvement, equipment, maintenance and operation thereof in any suitable officer, board or body of such county, city, or town. A member of the governing body of any such county, city, or town may also serve as a member of any board or body established to manage an airport or landing field. No such city, town or county, however, shall operate an airport without first obtaining the permission of the Board as now or hereafter provided by law.^[9]

The General Assembly from time to time also has created local or regional airport authorities or commissions that are expressly authorized to operate airports. Examples include the Charlottesville-Albemarle Airport Authority,¹⁰ the Commercial Space Flight Authority,¹¹ the Winchester Regional Airport Authority,¹² the Roanoke Regional Airport Commission,¹³ the Blue Ridge Airport Authority,¹⁴ the Middle Peninsula Regional Airport Authority,¹⁵ the Dinwiddie Airport and Industrial Authority,¹⁶ the Virginia Tech/Montgomery Regional Airport Authority,¹⁷ the Luray-Page County Airport Authority,¹⁸

⁸ VA. CODE ANN. § 5.1-31 (2010).

⁹ Section 5.1-41 (2010).

¹⁰ 1995 Acts ch. 286.

¹¹ 1995 Acts ch. 758.

¹² 1995 Acts ch. 338.

¹³ 1996 Acts ch. 385.

¹⁴ 1996 Acts ch. 465.

¹⁵ 1997 Acts ch. 871.

¹⁶ 2000 Acts ch. 261.

¹⁷ 2001 Acts ch. 202.

¹⁸ 2004 Acts ch. 39.

and the Clarksville-Boydton Airport Commission.¹⁹ Special acts granting authority to operate airports typically contain detailed provisions about the exact scope and limitations of authority for specific functions.²⁰

The absence of any language about IDAs operating airports in the Act is significant as a matter of statutory construction when compared with the explicit and detailed grants of powers to operate airports given by statute to localities, and given by special acts to individual local or regional airport authorities. When the legislature omits language from one statute that it has included in another, courts may not construe the former statute to include that language, as doing so would ignore “an unambiguous manifestation of a contrary intention” of the legislature.²¹ I therefore conclude that, absent special legislation for a particular IDA, IDAs generally do not have legal authority to operate airports.

There is also a restriction on the powers of IDAs that is relevant to this analysis: an IDA “shall not have power to operate any facility as a business other than as a lessor.”²² To the same effect, an IDA “shall not itself be authorized to operate any such manufacturing, industrial, nonprofit or commercial enterprise”²³ These statutes evince a legislative intent that where an IDA owns property, it may function only as a passive landlord, and it may not actively engage in business or commerce. The facts you present are that the IDA is not acting within the statutory limitation, *i.e.*, the IDA developed the airport; it holds the operator’s license for the airport;²⁴ it is the legally responsible operator of the airport; it has applied for and received financial assistance for the airport; it employs a manager who operates under general oversight of the IDA; and at various times portions of airport operations have been carried out by independent contractors of the IDA.

Finally, the regulations of the Department provide that a license that has been issued to a particular license holder to operate an airport may not be transferred to another entity without approval of the Department.²⁵ This regulatory structure indicates that a license does not merely authorize operation of a particular airport, it authorizes a particular license holder to operate that airport. Here, the license holder is, and always has been, the IDA.

¹⁹ 2005 Acts ch. 680.

²⁰ *See, e.g.*, 2009 Acts ch. 694, entitled “The Breaks Regional Airport Authority Act.” In relevant part, this Act creates the Breaks Regional Airport Authority, sets forth its rules of governance, and authorizes particular aircraft facilities and their permitted locations, the award of concessions, leases, and franchises, the setting of fees and rates, applications for and acceptance of gifts and grants, establishment of a foreign trade zone, employment of staff and professionals, personnel rules, a pension system, rules and regulations having the force and effect of law including imposition of misdemeanor penalties for violations, the power of eminent domain, and the issuance of bonds. The Act limits the use of these powers to operation of the airport. Certain officials who enforce the airport’s police powers are required to be certified by the Department of Criminal Justice Services. There are specific reporting and procurement requirements.

²¹ *See* Halifax Corp. v. Wachovia Bank, 268 Va. 641, 654 (2004).

²² Section 15.2-4905(13).

²³ Section 15.2-4901.

²⁴ Section 5.1-7 states that “every person, before *operating* an airport . . . shall first secure from the Department [of Aviation] a license.” (emphasis added). Thus, by operation of law, the holder of the license is the operator. Here, the IDA has always held, and presently holds, the license for the Airport.

²⁵ *See* 24 VA. ADMIN. CODE § 5-20-150(A) (providing “No license issued by the department for the operation of an airport or landing area may be transferred by the licensee without first obtaining the approval of the department.”).

It is my opinion that these activities, when considered within the Department's regulatory structure, make the IDA the active "operator" of the Airport, which is the type of active operation of a business or a commercial enterprise IDAs are barred from engaging in by statute.

2. Does contracting out certain functions mean that the IDA is not operating the Airport?

In response to your second question, I conclude that IDA's delegation of certain operational tasks of the Airport to third parties does not alter the conclusion that the IDA is operating the Airport. To operate an airport in Virginia, one first must obtain a license from the Virginia Department of Aviation, and the license is particular to the holder, not just the airport in question.²⁶ Under the facts you present, the IDA is the only entity holding a such a license for the Airport, and the license makes it the legally responsible party. Contracting out the responsibility for performing tasks necessary to operate an airport does not remove the licensee's ultimate control and responsibility for operations. Accordingly, it is the IDA – the licensee – which operates the Airport, not any entity or individual with whom it contracts to perform day-to-day airport management functions.²⁷

3. Does certification by the IDA's counsel give it authority to operate the airport?

Next, you ask whether the certification of the IDA's counsel to federal agencies awarding grants that the IDA has authority to carry out particular airport tasks gives that authority to the IDA. In my opinion, it does not. A certification by legal counsel is not enabling, it is merely counsel's interpretation of the law. Whether the IDA has the authority to operate the Airport is a matter of law as set forth in general or special legislation of the General Assembly, properly construed in accordance with Dillon's Rule principles.

4. Control by Board of Supervisors of IDA Projects

You ask whether the Board may limit the IDA's authority to incur debt and ensure that its activities and projects serve the County's economic development goals by limiting the type and number of IDA facilities.

While the Act is to be "liberally construed,"²⁸ § 15.2-4903(A) provides that the Board may by ordinance "limit the type and number of facilities that the authority may otherwise finance . . . which ordinance of limitation may, from time to time, be amended." As you recognize, at present there are no such limitations in Louisa's local code,²⁹ thus the IDA has all powers granted to it by the Act.³⁰ However, because the Board may amend the local code to "limit the type and number of facilities"³¹ financed by the IDA, the Board may, by ordinance, constructively limit the IDA's ability to incur debt by limiting the number and type of facilities that it may finance.

The Board may not, however, require that the IDA secure the Board's approval of the amount financed for a particular project. As this office previously opined when considering the question of

²⁶ *Id.*

²⁷ *The American Heritage Dictionary* defines the verb "operate" to mean, among other things, "to control the functioning of; run ... conduct the affairs of; manage." THE AMERICAN HERITAGE DICTIONARY 1233 (4th ed. 2000).

²⁸ Section 15.2-4901.

²⁹ COUNTY OF LOUISA, VA., CODE § 2-71.

³⁰ Sections 15.2-4900 through 15.2-4920.

³¹ Section 15.2-4903.

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whether a city council could require an IDA to obtain the council's prior approval of the purpose and amount of any proposed bond issue: "Council is authorized to limit the type and number of facilities, but it has no authority to dictate the terms of financial arrangements made by the Authority, which are, by statute within its province alone."³²

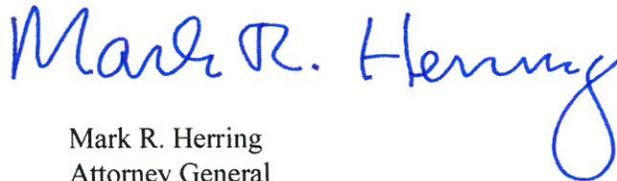
As to whether the County can ensure that the IDA's operations serve the County's economic development goals, the County's authority over the IDA is limited to limiting the type and number of facilities. Whether doing so will serve the County's economic development goals is a matter for the Board to determine. There is no statutory authority to specifically require compliance with economic development goals.

Conclusion

Accordingly, it is my opinion that the IDA presently lacks legal authority to operate the Airport. Contracting out certain airport operations does not change the fact that the IDA is the Airport operator. The certification of the IDA's attorney that the IDA has authority to conduct certain airport activities does not create that authority where it does not exist under applicable law. The Board may limit the number and type of projects undertaken by the IDA, but the Board may not limit the debt incurred by the IDA on a particular project.

With kindest regards, I am

Very truly yours,



Mark R. Herring
Attorney General

³² 1977-78 Op. Va. Att'y Gen. 187, 189 (emphasis added).